FILED BY CLERK
JUL 11 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ROBERT DOUGLAS SMITH,

Petitioner,

v.

HON. JAN E. KEARNEY, Judge of the Superior Court of the State of Arizona, in and for the County of Pima,

Respondent,

and

THE STATE OF ARIZONA,

Real Party in Interest.

2 CA-SA 2008-0019
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR05669

JURISDICTION ACCEPTED; RELIEF DENIED

Ellinwood, Francis & Plowman, LLP
By Ralph E. Ellinwood
and
Law Offices of Williamson & Young, P.C.
by S. Jonathan Young
Tucson
Attorneys for Petitioner

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jeffrey A. Zick
Phoenix
Attorneys for Real Party in Interest

E S P I N O S A, Judge.

¶1 The procedural history of this case is set forth in the Supreme Court's decision in *Schriro v. Smith*, 546 U.S. 6 (2005), and in the respondent judge's order in the underlying proceeding. *See also Stewart v. Smith*, 536 U.S. 856 (2002). Relevant here is the fact that the case was remanded to the trial court by the Ninth Circuit Court of Appeals for the purpose of determining whether the state is prohibited from executing petitioner Robert Douglas Smith under *Atkins v. Virginia*, 536 U.S. 304 (2002). In this statutory special action, Smith challenges the respondent judge's order of March 27, 2008 finding he is not mentally retarded and is therefore eligible for the death penalty for his 1982 conviction of first-degree murder.

¶2 Smith contends he presented sufficient evidence he had been mentally retarded in 1980 when he committed the offense; he is entitled to have a jury determine whether he was mentally retarded at the time of the offense; and the respondent judge erred when she

denied Smith's request for funds to conduct a "PET" scan[1] to support his claim that he had been mentally retarded. As we are required, *see* A.R.S. § 13-703.02(I), we accept jurisdiction of this special action and address the merits of Smith's claims. For the reasons stated below, we conclude the respondent neither exceeded her authority nor abused her discretion, and we therefore deny relief. *See* Ariz. R. P. Spec. Actions (among "only questions that may be raised in a special action are . . . [w]hether the [respondent] has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority . . . or . . . [w]hether a determination was arbitrary and capricious or an abuse of discretion").

¶3 A capital defendant may not be executed if "found to have mental retardation" based on evidence presented in accordance with § 13-703.02. "'Mental retardation' means a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen." § 13-703.02(K)(3). "'Significantly subaverage general intellectual functioning' means a full scale intelligence quotient of seventy or lower." § 13-703.02(K)(5). "'Adaptive behavior' means the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group." § 13-703.02(K)(1).[2]

---

[1]Positron emission tomography—a nuclear medicine imaging technique that produces three-dimensional images of functional processes in the body.

[2]Section 13-703.02 was enacted before the Supreme Court decided *Atkins* and represents the Arizona legislature's determination of which defendants may be characterized

¶4 At a hearing conducted in accordance with the statute, "the defendant has the burden of proving mental retardation by clear and convincing evidence." § 13-703.02(G); *see State v. Grell*, 212 Ariz. 516, ¶ 29, 135 P.3d 696, 702 (2006) (upholding constitutionality of statute's placing on defendant burden of establishing mental retardation and finding it similar to burden of proving affirmative defenses); *see also State v. Arellano*, 213 Ariz. 474, ¶ 12, 143 P.3d 1015, 1019 (2006) (defendant has burden of establishing mental retardation by clear and convincing evidence). The statute further provides:

> A determination by the trial court that the defendant's intelligence quotient is sixty-five or lower establishes a rebuttable presumption that the defendant has mental retardation. Nothing in this subsection shall preclude a defendant with an intelligence quotient of seventy or below from proving mental retardation by clear and convincing evidence.

§ 13-703.02(G).

¶5 Smith has been examined and tested by a number of mental health professionals both in this proceeding to determine mental retardation for purposes of the death penalty under *Atkins* and in earlier competency proceedings pursuant to Rule 11, Ariz. R. Crim. P. After an evidentiary hearing on October 29 and November 1, 2007, the respondent judge entered a thorough, well-reasoned order in which she set forth the applicable standard for determining the issue of mental retardation under § 13-703.02 and summarized the extensive evidence that was before her. She concluded Smith had "failed

---

as mentally retarded and establishes this state's criteria for making that determination. *See* 2001 Ariz. Sess. Laws, ch. 260, § 2.

to show the onset of mental retardation before the age of 18" and the state was not, therefore, precluded from executing him under *Atkins*.

¶6 The trial court has broad discretion in "'determining the weight and credibility given to mental health evidence'" in proceedings to determine whether a capital defendant has established mental retardation. *Grell*, 212 Ariz. 516, ¶ 58, 135 P.3d at 708, *quoting State v. Doerr*, 193 Ariz. 56, ¶ 64, 969 P.2d 1168, 1181 (1998). We defer to the trial court's factual findings, *Grell*, 212 Ariz. 516, ¶ 58, 135 P.3d at 708, but review questions of law de novo, *State v. May*, 210 Ariz. 452, ¶ 4, 112 P.3d 39, 41 (App. 2005).

¶7 The respondent judge noted she had considered the evidence under the applicable clear-and-convincing standard as well as under the lesser burden of a preponderance of the evidence that applies to post-conviction proceedings. *See State v. Andersen*, 177 Ariz. 381, 385-86, 868 P.2d 964, 968-69 (App. 1993); *see also* Ariz. R. Crim. P. 32.8. The respondent concluded under either standard Smith had failed to establish he was mentally retarded at the time of the offense and at trial. The respondent summarized the evidence that had been presented, including the evidence Smith points to in his special action petition. As the respondent noted, Dr. Thomas Thompson, the neuropsychologist selected by Smith, and Dr. Sergio Martinez both agreed Smith is not now mentally retarded. The respondent rejected Thompson's opinion that, nevertheless, there is a high probability he was mentally retarded when he committed the offenses. The respondent found more credible and therefore gave greater weight to the opinions of Martinez, which included the

opinion that it was highly probable Smith was not mentally retarded at the time of the offense.

¶8 Based largely on the testimony of Dr. Marc Nuwer, a neurologist from the Clinical Neurophysiology Department of UCLA Medical Center, the respondent judge further found that quantified electroencephalography (QEEG) testing, administered by a neuropsychologist at Thompson's recommendation, did not satisfy the standard for determining the admissibility of scientific evidence—whether the technique is generally accepted by the relevant scientific community. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The respondent found that, although Thompson did not rely solely upon the QEEG testing in concluding Smith had probably been mentally retarded in 1980, "it appears from the hearing testimony that this testing played a role in those areas where Dr. Thompson connected Defendant's functional limitations to frontal lobe damage." The respondent went on to find that, even if QEEG testing did meet the *Frye* standard, its results would be of little value in light of Thompson's testimony that Smith had improved substantially since his incarceration. The respondent also found Thompson's opinion was based on "an approach to defining mental retardation that is inconsistent with the requirements of Arizona law."

¶9 The respondent additionally noted and considered the testimony of other witnesses who had had past contact with Smith before the murder, and found "[t]he evidence concerning Defendant's life in the 1970's, considered as a whole, showed that he was a full participant in his adult life before the time of the offense." The court acknowledged the testimony of Martha Hight that she thought Smith had been mentally retarded because his

conduct was similar to that of Hight's mildly retarded sister. Hight's testimony supported Smith's contention that he had been mildly mentally retarded. But the court found Hight's statements inconsistent with the testimony of witnesses who had lived with Smith around the same time.

¶10 The respondent judge further found the results of tests administered from 1964 to 1965 unreliable and worthy of "little weight" because they were based on a 1920's model and could not be "extrapolated" to a period between 1980 and 1982. She also considered psychological evaluations performed by Dr. Martin Levy and Dr. John LaWall pursuant to Rule 11, Ariz. R. Crim. P. The respondent found their reports provided "valuable contemporaneous evidence of Defendant's mental state at the critical time between the crime and the trial and sentencing." She also considered Smith's own written statement, which she characterized as "lengthy, neatly written, logical, detailed, structured and coherent." Finally, the respondent considered the recommendations of the probation officer as stated in the presentence report.

¶11 The respondent's order reflects that she carefully considered all of the evidence presented and exercised her discretion in resolving conflicts in the evidence, in assessing the reliability of the test results and credibility of witnesses, and in weighing the evidence. *See Grell*, 212 Ariz. 516, ¶ 58, 135 P.3d at 708. We have no basis for interfering with these discretionary judgments nor will we reweigh the evidence. Because there is reasonable evidence in the record to support the respondent's factual findings, we cannot say those findings are clearly erroneous. *See id*. Therefore, we will not disturb her conclusion based

on those findings that Smith did not sustain his burden of establishing he is mentally retarded and had been so when he committed the offense.

¶12 We also reject Smith's contention that he had the right to have a jury determine his mental condition at the time of the offense. Smith relies on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, to support his claim. But in Smith's own case, the United States Supreme Court implicitly concluded a defendant is not entitled to a jury determination of whether he is mentally retarded and may not be executed under *Atkins*. *Smith*, 546 U.S. at 7-8. And in *Grell*, our supreme court squarely rejected the defendant's argument that *Atkins* requires a jury trial, instead reading *Smith* as "signal[ing]" and "suggest[ing]" a jury trial is not required. 212 Ariz. 516, ¶ 45, 135 P.3d at 706. "This court is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions." *State v. Long*, 207 Ariz. 140, ¶ 23, 83 P.3d 618, 623 (App. 2004). The respondent judge did not exceed her authority or abuse her discretion in rejecting this claim.

¶13 Smith's last argument is that the respondent judge abused her discretion and violated *Ake v. Oklahoma*, 470 U.S. 68 (1985), by denying his request for additional funds for a PET scan. Smith was provided funding for the QEEG test, the results of which the respondent later found inadmissible under *Frye*. But at a March 2007 status conference, she denied his funding request for the PET scan. Smith renewed his request in November 2007 at the *Atkins* hearing in light of the evidence that had been presented and the state's challenge to the admissibility of the QEEG test results under *Frye*. Smith noted in particular the testimony of Drs. Nuwer, Thompson, and the neurologist who had conducted the QEEG test.

The respondent again denied Smith's request stating, "I don't think there's any indication in the testimony that an examination like that is necessary for our purposes today. It might be nice, but I don't think anybody thinks it's necessary."

¶14 In *Ake*, the Supreme Court held an indigent criminal defendant is entitled to his own psychiatrist where insanity is a defense. 470 U.S. at 83. But the defendant is only entitled to funds when reasonably necessary for his defense. *Id*. at 77. Smith has not established his due process rights were violated in this context because he has not established a PET scan was reasonably necessary.

¶15 Thompson, Smith's own expert, testified that a PET scan was not necessary to establish Smith had been mentally retarded at the time of the offense because he was confident the results would show Smith had frontal lobe damage. Thompson testified about other indicia that Smith had that condition. And he stated that, if he were simply treating Smith and this case was not "in a legal system, [probably a PET scan] . . . would be overkill." He considered a person's behavioral history more important and equally indicative of whether there existed such damage.

¶16 Moreover, Smith has not demonstrated that a more concrete showing that he has suffered from frontal lobe damage could have affected the trial court's ultimate conclusion. The trial court's observation that the test was not "necessary for our purposes today," coupled with its conclusion that Smith was not mentally retarded at the time of the offenses, suggests the court either (1) was satisfied that Smith suffered from frontal lobe damage but did not consider it sufficient evidence of mental retardation, or (2) would not

have given the PET scan findings much, if any, credence in light of the other considerable evidence that Smith was not mentally retarded. Notably, any frontal lobe damage currently detectable on a PET scan would have to be considered in light of current intelligence tests showing Smith has near normal intelligence. Thus, while we do not dispute Thompson's testimony that frontal lobe damage can be a cause of mental retardation, Smith has not demonstrated on the facts before us how a current PET scan would be useful in assessing the pivotal question presented in this case—whether his mental functioning was significantly more deficient thirty years ago than today.

¶17 For the reasons stated, we deny Smith's request for special action relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge